REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 141 of 2003

NJERU MUTUNGA ……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

((An Appeal from a judgment of A. N. Kimani (S.R.M.) Criminal Case

No. 1316 of 2001 delivered on 24/06/2003)

JUDGMENT

The appellant was sentenced to a fine of Kshs. 10,000/= or in default to serve one year imprisonment for the offence of forcible detainer contrary to section 91 of the Penal Code. He filed this appeal – and it would appear he was released on bail pending appeal. Initially, the appellant and his counsel attended the court for the hearing of this appeal. But from 8th November 2007 neither the appellant nor his counsel has been attending court.

In response to summons by the court, the appellant's counsel appeared on 24th April 2008 and explained that the appellant was at large. A warrant for his arrest was issued and todate he has not been apprehended. He had challenged in this appeal both his conviction and sentence arguing that the evidence did not support the charge; that the dispute was of a civil nature.

It has been held that in a case where the appellant, as in this case, has disappeared having filed an appeal, the court cannot dismiss the same, as it does in civil appeals, for want of prosecution. See **John Olira Taro V. R.** Cr. Case No. 52 of 1999. In **Simon Mwangi Kirika V. R.** Cr. Application No. NAI. 3 of 2006 the Court of Appeal explained that:-

"*……..the only way open for an appellate court which found itself without an appellant on the day scheduled for hearing, was to hear the appeal exparte or adjourn it……..*"

That is why without the appellant, I have decided to consider this appeal. If this is not done, the backlog of appeal will grow to unprecedented levels as there are numerous appeals pending, even in this court where the appellants have lost interest in the appeals or even dead. This is a tedious route but until the law is changed, this court must travel it.

I have noted that the appellant was convicted and sentenced for the offence of forcible detainer contrary to section 91 of the Penal Code. The section provides that,

"*91. Any person who being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.*"

For this offence to be proved, it must be shown that the suspect has taken possession of another person's land and is holding it in a manner likely to cause a breach of the peace. The dispute relates to two adjacent parcels of land, MWIMBI/CHOGORIA/418 and MWIMBI/CHOGORIA/417. The two parcels are divided by a road with a small portion, v-shaped, extending into parcel No. 417. It is that portion that is the borne of contention. The appellant who occupies and is the owner of parcel No. 417 maintains that the v-shaped portion is his while the complainant also claims the same as his. According to the evidence on record, the dispute was referred to the Land Registrar who found that the

land is part of parcel No. 418.

While I am satisfied from the totality of the evidence that the appellant was found working the portion in dispute, that evidence also shows that the disputed portion is part of parcel No. 418 which is registered in the name of Muga Murunga. It will be noted that the said Muga Murunga who is named in the charge sheet as the complainant was not called to testify even though there is evidence that he was alive at the time of the trial. Instead, his son, John Kenneth Ireri gave evidence claiming that he lives on parcel No. 418.

The offence of forcible detainer is committed on land and against the owner of that land. There is no evidence that the appellant's possession of the disputed portion was in any manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace against the registered owner.

For this reason this appeal succeeds and is allowed in its entirety. The conviction is quashed and sentence of a fine of Kshs. 10,000/= or one year imprisonment in default is set aside. If the fine was paid, the same to be refunded to the appellant. It is unlikely that the appellant may still be held in prison in connection with this matter. But if he is, he will be set at liberty forthwith unless he is held for some other lawful cause.

Orders accordingly.

Dated and delivered at Meru this 28th day o fMay 2009.

W. OUKO

JUDGE